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Special Issue: The South African Constitution in Transition

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Introduction: The South African Constitution in Transition

Richard W. Bauman and David Schneiderman

Articles

Participating in the Design: Constitution-Making in South Africa

Heinz Klug

Abstract

Constitution-making has typically been an elite driven process. The nature of this process and its outcome – the fettering of the will of the majority – has led to assertions that constitutionalism is anti-democratic. The author here concedes that these assertions are valid, but argues that the process leading up to the adoption of the interim South African Constitution tended to minimize elite domination and, indeed, was relatively inclusive. Professor Klug suggests that the confluence of a variety of forces, both domestic and international, necessitated an open and inclusive process of constitution-making in South Africa. As a result, groups based on shared characteristics, such as ethnicity, gender or class formed and, with varying degrees of success, were able to influence the outcome of constitutional negotiations. Indeed, South Africa's history is such that an elite dominated constitution-making process, particularly a process involving the National Party, would be widely perceived as profoundly illegitimate. The stage thus was set for the adoption of a final constitution by an inclusive, democratically elected South African Constitutional Assembly.

Traditional Authority and Democracy in the Interim South African Constitution

Yvonne Mokgoro

Abstract

Among the many problems inherent in the post-apartheid South African reconstruction is the question of the extent to which traditional authority should be incorporated into the new and democratic political regime. The author argues that the role of traditional authority is problematic because such authority has not been acquired democratically and has been fundamentally patriarchal. This fact sits uneasily with the lofty and progressive ideals to which the new South African politics currently aspires. However, traditional "Chiefs" play an important role in government at the local level, serve as an important link with pre-Apartheid "Africanism," and should not be quickly discarded. The author here argues that

while political necessity required the constitutional recognition and affirmation of traditional authority, justice demands that traditional authority be made more inclusive and democratic.

Federal Features of the Interim Constitution

Karthy Govender

Abstract

Achieving a workable distribution of powers in a federal state is always a delicate matter. Professor Govender here argues that the difficulty of this task in the South African context was exacerbated by the scepticism and antipathy of many South Africans, who viewed any attempt to subdivide the country politically as too close an approximation of the reviled homeland" policy. The author argues, however, that any such fears should be allayed by the interim South African Constitution. Indeed, the author asserts that on paper the interim constitution is sensitive to the country's regional and cultural diversity, while also recognizing the danger of creating regional governments which are too strong, thereby posing a risk of secession. Professor Govender acknowledges that the form the South African federation takes in practice will, of course, depend upon the particular interpretations of the broad language of the constitution rendered by the newly created Constitutional Court.

The Constitutional Court of South Africa: An Introduction

Patric Mtshaulana and Melanie Thomas

Abstract

The constitutional law of South Africa, like the nation itself, is undergoing monumental change. Under the present interim Constitution a new Constitutional Court was created to deal exclusively with constitutional matters. The authors provide an introduction to this Court, outlining the composition, jurisdiction, and procedures of the Court, and discussing past decisions of the Court. The authors emphasize that although the new Constitutional Court has looked to foreign judgments and international human rights jurisprudence -- such as the Canadian Charter of Rights and Freedoms -- for guidance, it has consciously developed an indigenous jurisprudence based on South African values.

A Ringing and Decisive Break with the Past?

Hugh Corder and Dennis Davis

Abstract

It is a trite observation that in a constitutional democracy, the constitutional text means whatever the courts say it means. The more interesting issue arises from the courts' construction of the constitutional text and the particular tools or sources the courts employ to give meaning to that text. The authors argue that the early jurisprudence of the new South African Constitutional Court reveals some interesting trends, not least of which is a marked departure from previous South African jurisprudence. Of particular interest to the

authors and central to the interpretation of the new South African Constitution is the "reasonable" and "necessary" limits clause contained in section 33 of the interim Constitution, and the "interpretation" clause, section 35 of the Constitution. The authors argue that in construing these and other important sections of the transitional Constitution, the Court has placed great emphasis on certain interpretive tools, like legislative intent, while surprising (v) little weight has been accorded other sources, like South African legal scholarship. The authors also assert that although adjudication under the interim Constitution is only in its nascent stages, a strong measure of support for constitutional supremacy seems to underpin the Court's jurisprudence to date. It remains to be seen whether the interpretive trends identified by the authors continue in evidence in future South African constitutional jurisprudence or whether they are revealed as mere context-specific responses to the Court's early cases.